YB MENTERI SUMBER MANUSIA

v.

ASSOCIATION OF BANK OFFICERS, PENINSULAR MALAYSIA

FEDERAL COURT, KUALA LUMPUR
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
ABU MANSOR ALI JCA
[CIVIL APPEAL NOS: 01-4-98(W) & 02-10-98(W)]
26 OCTOBER 1998

LABOUR LAW: *Trade union - Recognition - Dispute as to whether workmen employed in executive capacity - Industrial Relations Act 1967, s. 9(1A) - Whether dispute must be between employer and employee only - Whether dispute between two trade unions envisaged by s. 9(1A) - Whether such disputes can be referred to D-G of Industrial Relations - Whether Minister had threshold jurisdiction to consider notification from D-G of Industrial Relations*

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Grounds outside scope of questions in respect of which leave to appeal was granted - Whether Federal Court has power and discretion to allow - Whether a respondent can raise such grounds - Whether an appellant can raise such grounds - Rules of the Federal Court 1995, rr. 108(1)(c), 57(2) - Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Decision of Minister - Whether decision-making process flawed - Wednesbury unreasonableness - Fairness - Whether Minister took into account matters he ought to - Whether Minister considered matters he ought not to - Whether Minister relied on inadequate materials - Whether Minister's reasons for decision adequate - Whether Minister directed himself properly in law*

The two appeals herein by the Minister of Human Resources ('the Minister') and the National Union of Bank Employees ('the Union') respectively were from the decision of the Court of Appeal allowing the appeal by the Association of Bank Officers Peninsular Malaysia ('the Association') against the refusal of the High Court to quash the decision of the Minister, ie, that those tellers and receptionists ('the officers') of Perwira Affin Bank ('the Bank') who were upgraded to the status of internal officers had not thereby become officers employed in an executive capacity within s. 9(1) of the Industrial Relations Act 1967 ('the Act').

In reversing the High Court, the Court of Appeal upheld the Association's principal contention, ie, that as there was **no** dispute between the Bank and its employees as to whether the officers were employed in an executive capacity within s. 9(1) of the Act, the Director General of Industrial Relations ('the DGIR') had no jurisdiction to entertain the purported reference under s. 9(1A) thereof or to notify the Minister under s. 9(4C) thereof and, accordingly, the Minister had no threshold jurisdiction to consider the purported notification and give a decision pursuant to s. 9(5) thereof.

The question of law in respect of which leave to appeal was granted by the instant court was whether the type of dispute envisaged by s. 9(1A) of the Act is strictly one between an employer and an employee. The other central issue was whether the Minister had acted irrationally and illegally and in excess of jurisdiction by failing to consider relevant factors of fact and law.

Held:

Per Edgar Joseph JR FCJ

[1] The type of dispute envisaged by s. 9(1A) of the Act is **not** confined to one between an employer and an employee. [A dispute between two trade unions is, conceivably, a dispute within the section.] Section 9(1A) of the Act expressly authorises a trade union of workmen or an employer or a trade union of employers to refer disputes to the DGIR. Hence, the Minister did have the threshold jurisdiction to entertain the notification from the DGIR.

[2] There can be no justification for depriving a **respondent** to an appeal of his general right to take any point open to him in order to hold the judgment he has obtained, even though the point taken is outside the scope of the issue in respect of which leave to appeal was granted by the Federal Court. [This principle applies to an **appellant** as well (Rules of the Federal Court 1995, s. 57(2)]. The Federal Court has the power and, therefore, the discretion to permit an appellant to argue a ground which falls outside the scope of the question in respect of which leave to appeal was granted.

[3] An examination of the Minister's reasons for decision revealed that his decision-making process pursuant to s. 9(5) of the Act was flawed on three separate grounds, ie: (i) although the Minister had conceded that the majority of the officers were performing the job functions of internal officers as listed out by the Bank (as opposed to a minority who did not), yet he had considered all the officers on the same footing and decided that they were not employed in an executive capacity within s. 9(1) of the Act; (ii) the Minister had relied on the investigations of the DGIR carried out under s. 9(4A) of the Act. These investigations were without

the advantage of the participation and expertise of the Director General of Trade Unions ('the DGTU') to which the DGIR was entitled under s. 9(4B)(b) of the Act. Although the DGIR had a discretion under s. 9(4B)(b) of the Act whether or not to refer the matter to the DGTU, the DGIR could not be considered to have exercised his discretion properly in the circumstances. Hence, the investigations upon which the Minister had relied in coming to his decision were inadequate; and (iii) the Minister's reasons for decision were inadequate. They were mere denials with no suggestion that the Minister had directed his mind to the substantial points of law raised by the Association.

Per curiam:

[1] In the delicate field of labour relations, the High Courts and, indeed, the higher tiers of the judiciary, should generally pursue a policy of restraint by not involving themselves in issues which move too far from those of strict law into those with substantial labour relation elements.

[2] The idea of absolute or unfettered discretion has no place in public law.

[Judgment of Court of Appeal quashing decision of Minister upheld; Minister directed to consider dispute afresh; DGIR directed to refer to DGTU.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Dua rayuan disini oleh Menteri Sumber Manusia dan Kesatuan Pekerja Bank Kebangsaan masing-masing adalah dari keputusan Mahkamah Rayuan yang mebenarkan rayuan oleh Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia terhadap keengganan Mahkamah Tinggi untuk membatalkan keputusan Menteri iaitu bahawa "teller" dan penyambut tetamu dari Perwira Affin Bank yang dinaikkan pangkat ke status pegawai dalaman tidak dengan demikianya menjadikan mereka pegawai yang berkerja dalam kedudukkan eksekutif mengikut s. 9(1) Akta Perhubungan Perusahaan 1967.

Dalam mengakaskan keputusan Mahkamah Tinggi, Mahkamah Rayuan telah mempertahankan penghujahan utama Persatuan iaitu oleh kerana **tiada** pertikaian diantara bank dan pekerja-pekerjanya mengenai samada pegawai-pegawai tersebut berkerja dalam kedudukkan eksekutif mengikut s. 9(1) Akta tersebut, Ketua Pengarah Perhubungan Perusahaan tidak mempunyai bidang kuasa untuk melayan rujukkan dibawah s. 9(1A) Akta tersebut atau untuk memberi notifikasi kepada Menteri dibawah s. 9(4C) Akta tersebut dan oleh yang demikian, Menteri tidak mempunyai had bidang kuasa untuk mempertimbangkan apa yang dikatakan sebagai notifikasi dan memberi satu keputusan menurut s. 9(5) Akta tersebut.

Persoalan undang-undang di atas mana keizinan untuk merayu diberikan oleh mahkamah ini ialah samada jenis pertikaian yang dibayangkan oleh s. 9(1A) Akta tersebut adalah secara ketat sesuatu diantara majikan dan pekerja. Isu utama yang lain adalah samada Menteri berkelakuan tidak rasional dan secara tidak sah dan membatasi bidang kuasa dalam kegagalannya untuk mengambil kira faktor-faktor fakta dan undang-undang yang relevan.

Diputuskan:
Oleh Edgar Joseph Jr HMP

[1] Jenis pertikaian yang di bayangkan oleh s. 9(1A) Akta tersebut **bukanlah** terhad kepada pertikaian diantara majikan dan pekerja. [Pertikaian diantara dua kesatuan sekerja adalah satu pertikaian dibawah seksyen tersebut.] Seksyen 9(1A) Akta tersebut dengan nyata memberi kuasa kepada sebuah kesatuan sekerja, ataupun seorang majikan atau kesatuan sekerja majikan untuk merujuk pertikaian kepada Ketua Pengarah Perhubungan Perusahaan. Oleh yang demikian, Menteri mempunyai had bidang kuasa untuk melayan notifikasi dari Ketua Pengarah Perhubungan Perusahaan.

[2] Tiada kewajaran yang boleh diberi kepada penahanan hak umum seorang **responden** dalam suatu rayuan untuk mengambil sebarang sudut pandangan yang terbuka kepadanya untuk berpegang kepada penghakiman yang diperolehinya, walaupun sudut pandangan yang diambil adalah diluar skop isu dalam mana kebenaran untuk merayu telah diberikan oleh Mahkamah Persekutuan. [Prinsip ini juga terpakai kepada seorang **perayu** [Kaedah-kaedah Mahkamah Persekutuan 1995, s. 57(2)]. Mahkamah Persekutuan mempunyai kuasa dan oleh yang demikian mempunyai budi-bicara untuk membenarkan perayu berdebat suatu alasan yang terkeluar dari skop soalan berkaitan dimana keizinan untuk merayu di berikan.

[3] Atas pemeriksaan sebab-sebab Menteri berkeputusan sebegitu, adalah didapati bahawa proses membuat keputusan beliau adalah salah atas tiga alasan berlainan iaitu: (i) walaupun Menteri telah menyetujui bahawa majoriti pegawai sedang menjalankan tugas kerja pegawai dalaman seperti yang disenaraikan oleh Bank (berlawanan dengan minoriti yang tidak) namun dia menganggap kesemua pegawai berada ditaraf yang sama dan berkeputusan bahawa mereka tidak digaji didalam kedudukkan eksekutif dibawah s. 9(1) Akta tersebut; (ii) Menteri telah menaruh kepercayaan kepada penyiasatan yang dibuat oleh Ketua Pengarah Perhubungan Perusahaan dibawah s. 9(4A) Akta tersebut. Penyiasatan ini tidak mengandungi penyertaan dan kemahiran Ketua Pengarah Kesatuan Sekerja, yang mana Ketua Pengarah Perhubungan Perusahaan berhak kepada dibawah s. 9(4B)(b) Akta tersebut. Walaupun Ketua Pengarah Perhubungan Perusahaan mempunyai budi bicara sendiri dibawah s. 9(4B)(b) Akta

tersebut samaada untuk merujuk perkara tersebut kepada Ketua Pengarah Kesatuan Sekerja, Ketua Pengarah Perhubungan Perushaan tidak boleh dikatakan telah mempergunakan budi bicaranya dengan betul. Oleh yang demikian penyiasatan atas mana Menteri telah menaruh kepercayaan tidak memadai; (iii) sebab-sebab Menteri berkeputusan sebegitu juga tidak memadai. Ia hanya cuma penafian dengan tidak adanya bukti bahawa Menteri telah mengarahkan mindanya terhadap perkara undang-undang yang dibangkitkan oleh Kesatuan Pegawai Bank Semenanjung Malaysia.

Per Curiam:

[1] Dalam jurusan perhubungan buruh yang halus, Mahkamah Tinggi dan juga bahagian atasan badan kehakiman perlu secara umumnya mengikuti polisi kesabaran dengan tidak melibatkan diri mereka dalam isu yang bergerak terlalu jauh dari undang-undang ketat dan ke dalam sesuatu yang mempunyai elemen berhubungan buruh yang substantif.

[2] Idea mengenai budi-bicara yang mutlak dan tidak terhindar tidak mempunyai tempat didalam undang-undang awam.

[Penghakiman Mahkamah Rayuan membatalkan keputusan Menteri dipertahankan; Menteri diarahkan untuk mempertimbangkan semula pertikaian; Ketua Pengarah Perhubungan Perusahaan diarah untuk merujuk kepada Ketua Pengarah Kesatuan Sekerja.]

Case(s) referred to:

A-G v. Fulham Corporation [1921] 1 Ch 440 ***(refd)***
Anisminic v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***
Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***
Commissioners of Customs & Excise v. Cure & Deeley Ltd [1962] 1 QBD 340 ***(cit)***
Congreve v. Home Office [1976] QB 629 ***(cit)***
Daganayasi v. Minister of Immigration [1980] 2 NZLR 130 ***(foll)***
East Hampshire District Council v. Secretary of State for the Environment & Josephi [1979] JPL 533 ***(refd)***
Edwin H Bradley & Sons Ltd v. Secretary of State for the Environment [1982] 264 ***(refd)***
Errington v. Errington [1952] 1 KB 290 ***(cit)***
Evans v. Collins [1965] 1 QB 580 ***(cit)***
Fowler & Roderique Ltd v. A-G [1987] 2 NZLR 56 ***(refd)***
General Electric Co Ltd v. Price Commission [1975] ICR 1 ***(foll)***
Greednz v. Governor General [1981] 1 NZLR 172 ***(refd)***
Jagendorf & Trott v. Secretary of State & Krasucki [1985] JPL 771 ***(refd)***
Laker Airways Ltd v. Department of Trade [1977] 1 QB 643 ***(refd)***
Metal Industry Employees Union v. RTU [1982] 1 MLJ 46 ***(cit)***
Minister for Aboriginal Affairs v. Peko-Wallsend Ltd [1986] 162 CLR 24 ***(refd)***

National Union of Hotel Bar & Restaurant Workers v. Minister of Labour & Manpower [1980] 2 MLJ 189 ***(refd)***
New Zealand Fishing Industry Association Inc v. Minister of Agriculture & Fisheries [1988] 1 NZLR 544 ***(refd)***
Padfield v. Minister of Agriculture, Fisheries & Food [1968] AC 997 ***(cit)***
Pahang South Omnibus Co Bhd v. Minister of Labour & Manpower [1981] 1 CLJ 83 ***(cit)***
Property Holding Co v. Clark [1948] 1 KB 630 ***(cit)***
R v. Boundary Commission, ex p Foot [1983] QB 600 ***(refd)***
R v. Hertfordshire CC, ex p Cheung (The Times, 4 April 1986) ***(cit)***
R v. Hillingdon Health Authority, ex p Goodwin [1984] ICR 800 ***(refd)***
R v. Home Secretary of State, ex p Awuku (The Times, 3 October 1987) ***(cit)***
R v. Secretary of State for Trade & Industry, ex p Lonrho Plc [1989] 1 WLR 525 ***(refd)***
R v. Take-overs & Mergers Panel, ex p Guiness Plc [1990] 1 QB 146 ***(refd)***
Re Poyser & Mills Arbitration [1964] 2 QB 467 ***(refd)***
Re W (An Infant) [1971] AC 682 ***(refd)***
Reg v. Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd [1988] AC 858 ***(refd)***
Sababumi (Sandakan) v. Dato' Yap Pak Leong [1998] 3 CLJ 503 ***(dist)***
Save Britain's Heritage v. Number 1 Poultry Ltd [1991] 1 WLR 153 ***(refd)***
Secretary of State for Education v. Tameside Metropolitan Borough Council [1977] AC 1014 ***(foll)***
Secretary of State for Employment v. ASLEF (No 2) [1972] 2 QB 455 ***(cit)***
Selangor Omnibus Co Bhd v. Perumal [1981] 2 MLJ 124 ***(cit)***
Simplex GE Ltd v. Secretary of State for the Environment & the City of St Albans District Council [1988] COD 160 ***(refd)***
Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***
Tanjong Jaga Sdn Bhd v. Minister for Labour & Manpower [1987] 1 MLJ 124 ***(refd)***
Thomas v. Marconi's Telegraph Co Ltd [1965] 2 All ER 598 ***(foll)***
Viking Askim Sdn Bhd v. NUECM [1990] 2 ILR 634; [1991] 1 CLJ 552 ***(cit)***
Waller & Sons Ltd v. Thomas [1921] 1 KB 541 ***(cit)***
Westminister Council v. Great Portland Estates Plc [1985] 1 AC 661 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 5(2)(a), (b), 9(1), 9(1A), 9(4), 9(4A), 9(4B), 9(4C), 9(5), 9(6), 11, 13(3)(a), 17(1)(a), (b), 32(2), 56(1), (2)(c), (3)
Rules of the Federal Court 1995, rr. 47(4), 57(1), (2), 108(1)(c)

Other source(s) referred to:

Administrative Law, Prof Sir William Wade, 5th edn, pp 355-357
Administrative Law, Wade & Forsythe, 7th edn, pp 391-393, 399, 414
Administrative Law of Malaysia & Singapore, Prof MP Jain, 3rd edn, pp 445-446
Appendix to Dicey's Law of the Constitution, Wade, 1952, 9th edn, p 487
Judicial Review, Supperstone, 1997, 2nd edn, paras 5.35, 5.44(e)
Judicial Review of Administrative Action, de Smith, 5th edn, para 5.094, pp 288, 559, 560
Judicial Review of Administrative Law, de Smith, 5th edn, para 9.053

Civil Appeal No: 01-4-98(W)
For the appellant - Alice Loke Yee Ching SFC
For the respondent - B Lobo; M/s Lobo & Assoc

Civil Appeal No: 02-10-98(W)
For the appellant - KP Gengatharan (N Mahalingan with him); M/s Genga Maha Wong & Co
For the respondent - B Lobo; M/s Lobo & Assoc
For Perwira Affin Bank - S Nanthabalan

[Appeal from Court of Appeal; Civil Appeal No: W-01-186-95; [1997] 4 CLJ 1]

Reported by Gan Peng Chiang

JUDGMENT

Edgar Joseph Jr FCJ:

Preliminary

These were two appeals (heard together for convenience) by the Minister of Human Resources ("the Minister") and the National Union of Bank Employees ("NUBE"), respectively, from the decision of the Court of Appeal, allowing the appeal of the Association of Bank Officers, Peninsular Malaysia ("ABOM"), from the decision of the High Court, refusing an application for an order of *certiorari* to quash the decision of the Minister made under s. 9(5) of the Industrial Relations Act 1967 ("the Act") that certain employees of Perwira Affin Bank ("the Bank") who were tellers and receptionists and who had been upgraded/promoted to the status of Internal Officers ("the relevant officers") had not thereby become officers employed in an executive capacity within the meaning of s. 9(1) of the Act.

In this judgment, all references to sections, unless the context otherwise requires, are to sections of the Act.

The Proceedings In The High Court

In the High Court, the applicants were, of course, ABOM whilst the Minister, the Bank and NUBE, were the first, second and third respondents, respectively.

Broadly stated, the grounds upon which ABOM relied to impugn the decision of the Minister by way of *certiorari* were, that in arriving at his decision aforesaid, he acted irrationally, and illegally and in excess of jurisdiction, in that he had refused or failed to take into account certain relevant considerations of Fact and Law to which we shall refer later.

A separate ground relied upon by ABOM was that there being no dispute as between the Bank and ABOM regarding the question whether or not the relevant officers were executive officers, the Director General of Industrial Relations ("the Director General") had no jurisdiction to entertain the purported reference under s. 9(1A) or to notify the Minister under s. 9(4C), and by the same token, the Minister himself had no threshold jurisdiction to embark upon a consideration of the purported notification, and consequently, to give a decision thereon pursuant to s. 9(5).

In the event, none of the contentions of Counsel for ABOM prevailed; the learned Judge in the High Court holding that the Minister had the necessary threshold jurisdiction to consider the notification from the Director General and his decision was not flawed by *mala fides,* Wednesbury unreasonableness or breach of the rules of natural justice. The application was accordingly dismissed with costs.

The Proceedings In The Court of Appeal

From that decision of the High Court, ABOM appealed to the Court of Appeal on a number of grounds but at the end of the day, the only ground which commended itself to the Court of Appeal was that relating to the threshold jurisdiction of the Minister, that is to say, that there being no dispute as between the Bank and its workers as to whether any of them were employed in a managerial, executive, confidential or security capacity, recourse to s. 9(1A) was precluded. The reasoning of the Court of Appeal appears sufficiently from the following passages in its judgment:

> From the above provisions [(s. 9(1A)], it seems clear that in order for any party mentioned therein to have recourse to s. 9(1A) the condition precedent is that a dispute had arisen as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity. From our perusal of the records, at all material times there was no evidence of any such dispute. The dispute envisaged in that section must necessarily be between the employees and the bank. What seems to be a dispute here is between two trade unions, the Appellant and the Third Respondent, each claiming to have a superior right to represent the internal officers.
>
> We stress again that no dispute had arisen between the 2nd Respondent and those of its employees that were affected by the upgrading/promotion exercise and as such these could not have been recourse to section 9(1A) of the 1967 Act and no representation ought to have been referred to the DG under there circumstances, the DG, therefore, had no jurisdiction to entertain the so called representation from either the Appellant or the 3rd Respondent. We are of the view that both, the Appellant and the 3rd Respondent, have no *locus standi* to refer the matter to the DG under section 9(1A). Flowing from that, the DG has no jurisdiction to entertain the reference and in turn to notify the 1st

Respondent, the Minister, under s. 9(4C). In the light of this we hold that the 1st Respondent had no threshold jurisdiction to entertain such a notification under s. 9(5).

The Proceedings In The Federal Court

As indicated at the outset, from that judgment of the Court of Appeal both the Minister and NUBE lodged separate appeals pursuant to leave of this Court, which were heard together for convenience.

According to the order granting leave to appeal, the question of Law for the determination of this Court – shortly put – concerned the threshold jurisdiction point and, more particularly, was this:

> What sort of dispute is envisaged by s. 9(1A) of Industrial Relations Act. Must it be dispute between employer and employee only?

In this judgment, unless the context otherwise requires, we shall, for the sake of brevity and convenience, refer to this question of Law as "the threshold jurisdiction point".

Before us, the submissions advanced by the parties, were not confined to the threshold jurisdiction point but were wide ranging and raised questions of Law and Fact along the same lines as those advanced in the Courts below. And, although the Bank was not cited as a respondent in either appeal to this Court, it was represented by Counsel and we did invite him to submit on certain aspects of the case and it was quite clear from what he said that the Bank was supporting ABOM regarding the questions of scope of representation and membership of the relevant officers.

To put the matter in perspective, the provisions of the Act which it would be convenient to set out are ss. 5(2)(a)(b), 9(1), 9(1A), 9(4), 9(4A), 9(4B), 9(4C), 9(5), 9(6), 11, 13(3)(a), s. 17(1)(a) and (b), 32(2), 56(1), (2)(c) and (3).

These provisions read as follows:

> 5(2) Subsection (1) [not applicable] shall not be deemed to preclude an employer from –
>
> (a) refusing to employ a person for proper cause, or not promoting a workman for proper cause, or suspending, transferring, laying-off or discharging a workman for proper cause;
>
> (b) Requiring at any time that a person who is or has been appointed or promoted to a managerial position shall cease to be or not become a member or officer of a trade union catering for workmen other than those in a managerial position.

9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say –

(a) managerial capacity;

(b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(4) Where the trade union of workmen concerned receives a notification under subsection (3)(B), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may report the matter in writing to the Director General.

(4A) The Director General, upon receipt of a reference under subsection (1A), or an application under subsection (3)(C), or a report under subsection (4) may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(4B) For the purpose of carrying out his functions under subsection (4A) the Director General –

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and

(b) may refer to the Director General of Trade Unions for his decision any question of the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

(4C) Where the matter is not resolved under subsection 1(4A) the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer

or trade union of employers concerned, as the case may be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.

(6) A decision of the Minister under subsection (5) shall be final and shall not be questioned in any court.

11. Where a trade union has been accorded recognition in respect of any workman or class of workmen whether by a decision of the Minister or otherwise no other trade union shall make any claim of recognition in respect of the same workman or class of workmen unless a period of three years has elapsed after such recognition has been accorded or the trade union which has been accorded recognition is no longer in existence.

13(3) Notwithstanding subsection (1), no trade union of a workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say –

(a) the promotion by an employer of any workman from a lower grade or category to a higher grade or category.

17(1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on –

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

32(2) As from the date of the award or as from such date and for such period as may be specified therein, it shall be an implied term of the contract between the workmen and employers bound by the award that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the award or decision unless varied by a subsequent award or agreement between the parties.

56(1) Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.

(2) The Court may, upon receipt of the complaint –

(c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement.

(3) Any person who fails to comply with an order of the Court under subsection (2) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit, or to imprisonment for a term not exceeding one year, or to both, and a further fine of five hundred ringgit for every day during which such offence continues.

The Factual Background

The essential facts which gave rise to the present litigation need to be explored a little further. In doing so, some degree of repetition will be inevitable.

ABOM is a trade union registered under the Trade Union Act 1959, whose membership, by virtue of r. 3 of its Constitution, is open to all workmen classified as Class II Officers in the Executive category and Internal Officers in the category excluding Management, Confidential and Security capacities in commercial banks in Peninsular Malaysia.

NUBE is also a trade union of workmen registered under the Trade Union Act 1959, membership of which is open to all workmen employed in categories other than, the Executive, Management, Confidential and Security capacities in commercial banks in Peninsular Malaysia.

The Bank is a commercial bank incorporated in Malaysia and, as we have already observed, although a party to the proceedings both in the High Court and the Court of Appeal, were not a party in the appeals before us. We mention this in passing only as nothing turns upon it.

We would interpolate, to observe, that it was said that as a result of the upgrading/promotion exercise on or about 1 June 1990, the majority of these relevant officers who were designated "Business Service Executives" and "Customer Service Officers" became eligible to be members of ABOM and, consequently, to be covered by the Collective Agreement between ABOM and the Bank ("the Collective Agreement") and it having been deposited in the Industrial Court was deemed to be an award by virtue of s. 17 of the Act ("the Award"). Indeed, ABOM and the Bank had treated the relevant officers as so covered since 1990 and they had thereby become entitled to, and indeed had been enjoying, up to the present time, certain benefits over and above that which they had been receiving prior to the upgrading/promotion exercise when they were within the scope of membership of NUBE.

We need to go back a little and add a few words about the Collective Agreement and the Award.

The effect of the Collective Agreement and the Award was to regulate the terms and conditions of service of, *inter alia*, the Bank's workmen who were designated Officers II and/or Internal Officers, many of whom were ABOM'S officers and were bound by the Collective Agreement the period of which was

from 1 January 1994 to 31 December 1996. It is therefore pertinent to refer to Article 7 of the Collective Agreement, by which the Bank recognised ABOM as the sole negotiating body in respect of Officers II and/or Internal Officers which term, both the Bank and ABOM said, included the relevant officers.

The material part of Article 7 provided as follows:

> The Association and the Bank shall recognise the Union as the sole negotiating body in respect of Officers II and Internal Officers.

At all material times, the Bank and NUBE were bound by a separate collective agreement which regulated the terms and conditions of service of non-executive workmen employed, *inter alia,* by the Bank.

As we have indicated, the Bank and ABOM stood on common ground in saying that the relevant officers were eligible for membership of ABOM and, that consequently, they came within ABOM's scope of representation. But there was, of course, an acute conflict between the two unions – ABOM and NUBE – as to which of them had the right to represent the relevant officers.

Who Was It Who Referred The Dispute To The Director General?

Before proceeding further, it would be convenient if we disposed of a point – concerning s. 9(1A) – and it is this: who was it who referred the dispute concerned to the Director General? Was it ABOM or NUBE? The Court of Appeal found that the Director General had acted upon a letter dated 17 August 1994 from ABOM addressed to him. In particular, the Director General had, in reply to that letter enquired from ABOM as to why it considered that the Internal Officers ("the relevant officers") ought to be represented by it. From this the Court of Appeal drew the inference that it was ABOM which had made the required representation under s. 9(1A).

In our view, this point is only of peripheral importance because nothing turns upon it. Whether it was ABOM or NUBE which made the required representation is not really material for, on either view, the Director General was authorised to entertain the reference under s. 9(1A).

Having said that, we consider that the probabilities are that it was NUBE which had made the required representation for it was NUBE which challenged the right of representation claimed by ABOM which right, incidentally, had been recognised by the Bank since 1990 and as a result, the relevant officers had come within ABOM's scope of representation.

It is true that what would have provided conclusive evidence on this point would have been an affidavit by the Director General but there was none.

The next topic to be logically considered is the role of the Director General.

a

The Role Of The Director General

In attempting to resolve the dispute, the Director General is empowered by s. 9(4A) "to take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter". To carry out his task the Director General is empowered by s. 9(4B) "... to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant" and by s. 9(4B)(b) "... to refer to the Director General of Trade Unions for his decision any question of the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions."

b

c

d

Moving on, we note that although in carrying out his functions under s. 9(4A), the Director General was empowered by s. 9(4B)(b) of the Act to refer to the Director General of Trade Unions for decision any question as to the competence of a trade union of workmen to represent any workmen or class of workmen in respect of whom recognition is sought, for reasons which are not apparent, he did not do so nor was any explanation vouchsafed to the Court for this omission. We shall return to this point later.

e

Indeed, although he had specific threshold statutory jurisdiction in the decision-making process under Part III of the Act, the Director General did not affirm and file any affidavit.

f

In the events which followed, the Director General after having made certain enquiries, collected information, and interviewed representatives of the two trade unions and the Bank, was unable to resolve the dispute and so, had pursuant to the provisions of s. 9(4C), notified the Minister, accordingly, at the same time passing on to him the results of his inquiries etc. The Minister then relying upon the material provided by the Director General, and in exercise of his powers under s. 9(5) of the Act, decided that the relevant officers were non-executive officers, which decision, if correct, meant that the relevant officers ceased to be members of ABOM and came within the scope of membership of NUBE and, in consequence, NUBE replaced ABOM as the trade union entitled to represent the relevant officers for the usual purposes permitted under the Act.

g

h

The next topic to be logically considered is the role of the Minister.

i

The Role Of The Minister

In considering this part of the case, we should like, first of all, to refer to the powers and duties of the Minister when deciding a dispute of the kind which arose in this case. In doing so, again some degree of repetition will be inevitable.

Although nowhere in the Act is the term "executive" defined, the Minister is specifically empowered by s. 9(5) to decide who are workmen employed in an "executive", "managerial", "confidential" or "security capacity". But before the dispute is referred to the Minister for decision it will have been referred to the Director General to see if he could resolve the matter. Moreover, the fact that at the time NUBE had referred the dispute to the Director General, the Bank had prior to that, already accorded recognition to ABOM in respect of the relevant officers, mattered not because the Act by s. 9(1A) expressly permits this.

We shall be addressing the issue of the adequacy of the Minister's reasons for decision under s. 9(5) at a later stage of this judgment.

This is a convenient point at which to consider the threshold jurisdiction point.

The Threshold Jurisdiction Point: S. 9(1A)

With all due respect, it is difficult to agree with the Court of Appeal that the dispute envisaged by s. 9(1A) of the Act, must necessarily be between an employer and an employee only. To so hold would be to do violence to the plain language of the statute which expressly authorises a trade union of workmen or an employer or a trade union of employers to refer the dispute concerned to the Director General.

Moreover, the practical consequences of so holding would be destructive of industrial peace and harmony as in the event of a dispute between two trade unions of the sort which occurred in this case, the only remedy would be to proceed by way of an ordinary action. Bearing in mind that Courts of Law would be ill equipped to resolve such issues, this is a conclusion to be avoided, if at all possible.

We are, thus compelled to hold, that the Minister ***did*** have the necessary threshold jurisdiction to entertain the notification under the Act from the Director General pursuant to s. 9(4C). Consequently, we would answer the question of Law in regard to which leave to appeal from the decision of the Court of Appeal to this Court was given, in favour of NUBE, that is to say, in the negative.

That, however, does not conclude this appeal.

Is ABOM As Respondent To The Appeal Confined To The Threshold Jurisdiction Point?

A preliminary question arises whether Counsel for ABOM is precluded from raising points other than the threshold jurisdiction point in order to hold the judgment he had obtained in the Court of Appeal bearing in mind that the sole ground upon which the Court of Appeal had reversed the High Court and quashed the decision of the Minister was the threshold jurisdiction point and, furthermore, that in accordance with R. 108(1) of the Rules of the Federal Court 1995, ("the Rules") the order of this Court granting leave to appeal specified only that issue for determination on the appeal to itself

We are aware of the decision of this Court in *Sababumi (Sandakan) v. Dato' Yap Pak Leong* [1998] 3 CLJ 503 where separate judgments were delivered and one of the Judges held (at p. 536i) that having regard to the provisions of R. 108(1)(c) of the Rules only the issues or questions framed by this Court when granting leave would be heard or entertained on the appeal to itself.

It should be noted, however, that in *Sababumi* the Court was dealing with an objection taken by Counsel for the respondent, the effect of which was that certain grounds raised in the memorandum of appeal were outside the scope of the issues in respect of which leave to appeal had been granted by the Federal Court and, that consequently, it was not open to the appellant to raise those grounds.

Although it might appear that what the Court had there said was expressed in terms wide enough to preclude ***either*** party from raising in the Federal Court a point outside the scope of the issue in respect of which leave to appeal was given, whatever the circumstances, we do not consider this was what was intended by the Court. As a matter of principle, there can be no justification whatsoever for depriving a respondent to an appeal of his general right to take any point open to him in order to hold his judgment. (See, *Viking Askim Sdn. Bhd. v. NUECM* [1990] 2 ILR 634, 638; *Waller & Son, Ltd. v. Thomas* [1921] 1 KB 541, DC; *Property Holding Co. v. Clark* [1948] 1 KB 630, at 637, CA; *Errington v. Errington* [1952] 1 KB 290 at 300, CA). Apart from these cases we consider it pertinent to refer to the following passage in the judgment of Willmer LJ in *Thomas v. Marconi's Telegraph Co. Ltd.* [1965] 2 All ER 598, CA (at p. 600) which we consider especially relevant:

> ... On principle, I should have thought that the position of a respondent, who is brought to this court on appeal against his will, is necessarily quite different from that of an appellant who initiates the proceedings in this court. It is right that an appellant should be precluded from raising here for the first time a point not taken below; but there is no similar justification for shutting out a respondent, who is brought here on appeal, from taking *any point* in support of the judgment which he has obtained. (Italics supplied)

In our view, therefore, it was open to ABOM to raise these other points in order to hold their judgment and both Counsel for the Minister and NUBE were quite correct in taking no objection.

We would go further and say that notwithstanding the *Sababumi* case, it would be wrong to assume that the last word has been spoken regarding the position of even an appellant who seeks to argue in this Court – a Court of Last Resort – a ground which falls outside the scope of the issues regarding which leave to appeal has been granted.

Looking at the Rules, we note that sub-rule 4 of Rule 47 shows that the appellant is "confined to matters, issues or questions in respect of which leave to appeal has been granted", and sub-rule 1 of Rule 57 *emphasises* the same point by providing that "*Subject to Rule 47(4)* ... the appellant shall prepare a memorandum of appeal setting forth the grounds of objection to the decision appealed against and specifying the points of law or fact which are alleged to have been wrongly decided ...", *but* sub-rule 2 of Rule 57 makes the important *concession* to the appellant by providing that "the appellant shall not at the hearing *without the leave of the Court* put forward any other ground of objection ..." (Italics supplied)

Clearly, therefore, having regard to these provisions, the Federal Court has the *power* and therefore the *discretion* to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice. These are matters which *Sababumi* does not appear to have addressed – perhaps, because they were not raised in argument – and so, the focus of the decision lay elsewhere; more particularly, having decided the question of *power* against the appellant, understandably, it did not address the issue of *discretion.*

The Privative Or Ouster Clause: S. 9(6)

We now turn to consider the privative or ouster clause – s. 9(6) of the Act – which says this:

> A decision of the Minister under subsection (5) shall be final and shall not be questioned in any court.

In *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 (perhaps the most important case in modern judicial review) the House of Lords widened the already wide doctrine of *ultra vires* to minimise the effect of an ouster clause of the "shall not be questioned" variety. In doing so, the House gave the following formulation of what errors are jurisdictional:

(a) The tribunal was not entitled to enter into the inquiry in question;

(b) The tribunal failed to comply with the conditions precedent to its jurisdiction;

(c) The tribunal made a decision it had no power to make;

(d) The tribunal made a decision in bad faith;

(e) The tribunal failed to comply with the rules of natural justice;

(f) The tribunal 'asked itself the wrong question';

(g) The tribunal 'applied the wrong test';

(h) The tribunal 'failed to deal with the question remitted to it and decided some question which was not remitted to it';

(i) The tribunal failed to take into account something it was required to take into account; and

(j) The tribunal based itself on something it was not entitled to take into account.

In the context of the present case, having regard to paras (i) and (j) of the above formulation, the Wednesbury ground is capable of being an effective deployment of argument notwithstanding the privative clause. See, also, *Tanjong Jaga Sdn. Bhd. v. Minister for Labour and Manpower* [1987] 1 MLJ 124 at 131 Col. 1 H, where the Supreme Court held that s. 9(6) of the Act is ineffective as regards jurisdictional error.

The Wednesbury Point – The Law

The Wednesbury Principle arose from the case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB (CA) 223 where the facts were these: Wednesbury Corporation was empowered by statute to grant licences for cinemas to be open on Sundays, subject to such conditions as they thought fit to impose. They granted a licence to open a cinema on Sundays, subject to the condition that no children under the age of fifteen should be admitted. The cinema proprietors argued that the condition was *ultra vires* and unreasonable, and argued that it should at least have been restricted to children not accompanied by an adult. The Court upheld the validity of the condition.

The following passage in the judgment of Lord Greene MR *ibid* at p. 228, 229 – regarded by many administrative lawyers as classically sybiline – captures the essence of what is now commonly called "Wednesbury unreasonableness":

> If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters ... Bad faith, dishonesty ... unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases ... If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent ... a person entrusted with a discretion must, so to speak, *direct himself properly in law*. He must call his own attention to the matters which he is bound to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority ... That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another ... It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere. But to prove a case of that kind would require something overwhelming ... (Italics supplied)

Supperstone in his book *Judicial Review* (2nd Edn., 1997) at para 5.35, when referring to the above formulations given by Lord Greene has observed – and we agree – that "law" is used deliberately to indicate that relevance may be derived not just from the enabling statute, or indeed other relevant statutes, but also general principles which may enlarge or confine the range of relevant criteria.

In the context of the present case, the important point to note about this passage is that it covers a multitude of errors which flow from (1) undue attention to the mere language of the Act and too little to its general scheme and purpose, and (2) the fallacy that unrestricted language naturally confers unfettered discretion.

Raja Azlan Shah CJ (now His Royal Highness Sultan Azlan Shah) summed up the legal position regarding the approach of the Court in interpreting the Act in the old Federal Court in *National Union of Hotel Bar and Restaurant Workers v. Minister of Labour and Manpower* [1980] 2 MLJ 189 at 191 Col. 1 B to D admirably:

> ... We must construe the Industrial Relations Act 1967 to determine its policy and object ...

> ... the intention of the Act is to regulate the relations between management and labour and to prevent and settle trade disputes ...
>
> ... if the Minister by reason of his having misconstrued the Act or for some other reason, so exercises his discretion in a way as to defeat the policy and object of the Act then he has clearly exercised it wrongly. In that case the Courts will interfere with the exercise of his discretion by saying that he has given no weight or has given insufficient weight to the considerations that ought to have weighed with him ...

The next case we would like to cite is a New Zealand case – *Greednz v. Governor General* [1981] 1 NZLR 172 – where, Cooke J (as he then was) explained that 'the more general and the more obviously important the consideration, the readier the court must be to hold that Parliament must have meant it to be taken into account.' This dictum was applied in the U.K. in *R v. Hillingdon Health Authority ex p Goodwin* [1984] ICR 800 where a decision to close a hospital was quashed for failure to take account of doctors' interests.

The classic case raising the issue of *ultra vires* goes back to 1921 – *Attorney-General v. Fulham Corporation* [1921] 1 Ch. 440: A local council was by statute authorised to establish public baths, wash houses and open bathing places for the health, comfort and welfare of the local inhabitants. The council then set about providing a laundry service. One local ratepayer objected: the council could help people to wash their own dirty linen, but not that of others. The court agreed: a laundry service was *ultra vires* the statute.

As Wade says in his *Appendix to Dicey's Law of the Constitution* (9th Edn., 1952) 487:

> The last word on the question of legality rests with the courts and not with the administration.

In more recent times, the "Wednesbury Unreasonableness" test has yielded such leading cases as *Secretary of State for Education v. Tameside Metropolitan Borough Council* [1977] AC 1014, and *Laker Airways Ltd. v. Department of Trade* [1977] 1 QB 643.

In *Tameside*, there had been a challenge to a Ministerial decision that a local authority had acted unreasonably in reverting from fully comprehensive state secondary schools to partly selective schooling. The Minister was given power to give direction if he was satisfied that that the local education authority were acting unreasonably. The case shows that misdirection as to material facts may also vitiate exercise of discretion. In the words of Scarman LJ, when giving examples of this, "misunderstanding or ignorance of an established and relevant fact" and acting "upon an incorrect basis of fact" can constitute a ground for judicial review. And Lord Wilberforce speaking (in *Tameside* at p. 1047)) with reference to the above power of the Minister to give directions said this:

> If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgment, however *bona fide* it may be, becomes capable of challenge.

The above passage in the judgment of Lord Wilberforce was quoted with approval by the old Federal Court of Malaysia in *Selangor Omnibus Co. Bhd. v. Perumal* [1981] 2 MLJ 124.

Another passage in the judgment of Lord Wilberforce in the *Tameside* case to which we should like to refer is this:

> In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister; they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact.

The next case we should like to refer to is *Laker Airways*, a striking feature of which, according to Wade and Forsythe in their work on *Administrative Law* (7th Edn.) at p. 414, "is the use of the doctrine of implied prohibition to restrain action which would normally be beyond the court's control".

In that case, the Civil Aviation Act, 1971, provided for the objectives which the Civil Aviation Authority had to meet in carrying out its functions. Under the Act, the Secretary of State was authorised to give the authority guidance regarding the performance of its functions which the authority was obliged to obey. The Court held that the guidance issued by the Secretary of State to the authority was *ultra vires* and invalid as it offended the statutory objectives, conflicted not only with the express policy of the Act but also with its general scheme. And, in the course of his judgment Lord Denning M.R. stated (at p. 705-06):

> when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly. By mistakenly I mean under the influence of a misdirection in fact or in law.

In *Smith v. Inner London Education Authority* [1978] 1 All ER 411, Denning M.R. said (at p. 415):

> It is clear that, if the education authority or the Secretary of State have exceeded their powers or misused them, the courts can say: 'Stop'. Likewise, if they have misdirected themselves in fact or in law. I go further. If they have exercised their discretion wrongly, or for no good reason, then too the courts can interfere.

In *Jagendorf and Trott v. Secretary of State and Krasucki* [1985] JPL 771, a material error by a planning inspector that an extension would not obstruct premises when clearly it would do so, was treated as a proper ground for quashing the decision of the planning inspector.

Other authorities in the U.K. to which we should like to refer regarding this part of the case are:

Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 QB 455, at p. 493; *R v. Hertfordshire CC ex p. Cheung* [1986], The Times, 4 April, a case concerning refusal to reconsider students' grant applications, *R v. Home Secretary of State ex p. Awuku* [1987] The Times, 3 October, a case where an immigration officer's decision was quashed for "material errors of fact" and breach of natural justice.

Yet another case – this time from New Zealand – which will repay reading is *Daganayasi v. Minister of Immigration* [1980] 2 NZLR 130 (per Cook J) where it was held that a Minister's decision was invalid by reason of failure to take into account the true facts as a result of having been misled by the inadequate report of the medical referee.

It is with the above principles in mind that we move on to consider whether there was substance in the submission advanced by Mr. Lobo for ABOM that the Minister had offended the Wednesbury principles by allegedly failing to take into account certain relevant factors both of Fact and Law.

The Wednesbury Point – Applying The Law To The Facts

Mr. Lobo urged that in arriving at his decision, the Minister had acted irrationally and illegally and in excess of jurisdiction by failing to take into consideration various relevant factors both of Fact and Law enumerated in the affidavit by the General Secretary of ABOM Mr. Ng Choo Seong affirmed on 24 March 1995.

For convenience, these factors may be taken, in substance, from the affidavit of Mr. Ng and stated thus:

(a) upon being upgraded/promoted as aforesaid, the relevant officers became members of ABOM and were covered by the scope of a Collective Agreement of 1994 ("the Collective Agreement") which had been taken cognizance of by the Industrial Court by virtue of Cognizance No. 253/

94 dated 17 September 1994, and thus deemed to be an award binding on the parties by virtue of s. 17(1) of the Act ("the Award") which, in turn, was reinforced by s. 32(2). The Collective Agreement, of course, regulated the rates of wages and the conditions of employment, this being a term implied by law, to wit, s. 17(2) of the Act. The effect of this was that the relevant officers enjoyed certain benefits over and above what they had enjoyed prior to the upgrading/promotion exercise;

(b) if the Minister's decision was allowed to stand, it would have the effect of downgrading the status of the relevant officers from executives to non-executives and, that too, with retrospective effect, thus depriving them of the benefits aforesaid which they had been enjoying for some five years on the basis that they were of executive rank. Put simply, the Minister's decision had the effect of taking away vested rights and hence the decision was *ultra vires* the powers conferred upon him under the Act – so it was said;

(c) the combined effect of ss. 5(2)(a) and 13(3) of the Act, was that the Bank was given the right to decide which of its staff should be promoted or upgraded and no trade union of workmen could meddle with that right which was a management prerogative save and except to the limited extent specified in the provisions of the proviso to s. 13(3) which relate to promotion procedures and which were immaterial to the present case. Accordingly, the Minister's decision was an interference with the management's right of promotion and, so, *ultra vires* the powers conferred upon him by the Act – so it was said;

(d) upon their promotion, the Internal Officers, that is to say, the relevant officers, became members of ABOM and were thus covered by the scope of the statutorily recognised Collective Agreement/Award, which was in force at all material times. The effect of the Minister's decision, if allowed to stand, would mean that if the Bank as employer acted upon it, the Bank would be in breach of Article 7 of the Collective Agreement, thus exposing itself to the risk of conviction under s. 56(3) of the Act – so it was said;

(e) as at the date of the Minister's decision, namely, 16 December 1995, the Collective Agreement/Award which was for a term of three years was only in its second year. It was therefore said that another consequence of the Minister's decision was, that if the Bank were to act upon it, the Bank would be in breach of s. 11 of the Act which provides:

> Where a trade union has been accorded recognition in respect of any workman or class of workmen whether by a decision of the Minister or otherwise no other trade union shall make any claim for recognition in respect of the same workman or class of workmen *unless a period of three years has* elapsed after such recognition has been accorded or the trade union which has been accorded recognition is no longer in existence. (Italics supplied)

(f) yet another effect of the Minister's decision was that it would amount to the removal of the relevant officers by the "back door" from the membership roll of ABOM without their having been accorded an opportunity of being heard at both the levels of the Director General and the Minister, thus violating the *audi alterem partem* rule (see, *Metal Industry Employees Union v. RTU* [1982] 1 MLJ 46, 47 at I) – so the argument ran.

We must now move on to consider the Minister's reasons for giving his decision under s. 9(5) of the Act.

Examining The Minister's Reasons

Here are the most noteworthy extracts from the affidavit in opposition of the Minister giving his reasons for decision which, being freely translated, read as follows:

10. (i) The result of the investigation carried out on the Internal Officers showed that the majority of them carried out the job functions listed out by the Bank but there were amongst them some who did not perform the duties of revising reports, statements and loan statistics and checking of documents for purposes of loan applications;

(ii) It has been established that not all the job functions of the internal officers required the assistance of other clerical staff;

(iii) They were not involved in making recommendations for promotion transfer or approval of leave;

(iv) They had no power to institute disciplinary action against their assistance.

11. I have been requested to make a decision regarding the dispute aforesaid and after taking into account all relevant factors and ignoring irrelevant factors, I gave my decision in Form E in exercise of my discretion according to Law.

12. I wish to refer to para 8(a) to (g) of the affidavit of Mr. Ng and deny the allegations referred to therein.

There are certain preliminary observations we should like to make regarding this part of the case.

First, we recognise that in the delicate field of labour relations, the High Courts and, indeed, the higher tiers of the Judiciary, should generally pursue a policy of restraint by not involving themselves in issues which move too far from those of strict law into those with substantial labour relation elements.

Second, to quote de Smith, on *Judicial Review of Administrative Action,* (5th Edn.) para 5.094, p. 288:

> In general it is right that courts do leave the assessment of fact to bodies which are primarily suited to gathering and assessing the evidence. Review must not become appeal. On the other hand it should be presumed that Parliament intended inferior bodies rationally to relate the evidence and their reasoning to the decision with which they are charged with making. The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision upon any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.

Thirdly, it is right to say, at the risk of being trite, that the idea of absolute or unfettered discretion has no place in public law. The reason for this is understandable for as Professor Sir William Wade has pointed out in his valuable work on *Administrative Law* (5th Edn, p. 355-357):

> The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.
>
> The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon lawful and relevant grounds of

> public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good ... Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers. The question which has to be asked is what is the scope of judicial review. But that there are legal limits to every power is axiomatic.

The above illuminating passsage by Wade (reproduced in his 7th Edn. at pp. 391/393) was adopted verbatim by Lord Bridge of Harwich speaking in the House of Lords in *Reg. v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858, 872, and thereby confirmed the classic *Padfield* ([1968] AC 997) principle of statutory purpose as the primary guide of public authority powers.

The imposition of legal limits on powers applies not only to local authorities but to Ministers of the Crown (See, *Commissioners of Customs and Excise v. Cure and Deeley Ltd. ibid.*; *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997; *Congreve v. Home Office* [1976] QB 629).

In considering the standard of reasonableness under the Wednesbury principle, Wade and Forsythe have said (*ibid* at p. 399) – and we heartily agree –

> the doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has a genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion.

The learned authors then refer to the case *R v. Secretary of State for Trade and Industry ex p. Lonrho Plc* [1989] when a Divisional Court yielded to that temptation by invalidating a Secretary of State's decision to postpone publication of a report by company inspectors, and the House of Lords held that the judgements illustrate the danger of judges wrongly though unconsciously substituting their own views for the views of the decision-making body who alone is charged by Parliament to exercise a discretion.

The learned authors then go on to say something which received the approval of Lord Denning M.R. in the Court of Appeal in *R. v. Boundary Commission ex p. Foot* [1983] QB 600 and it is this:

> The court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.

In this context, we should not forget the dictum of Lord Hailsham LC in *Re W (An infant)* [1971] AC 682 at 700 that two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. Nor should we forget the following passage in the judgment of Lord Denning in *General Electric Co. Ltd. v. Price Commission* [1975] ICR 1 quoted with approval in *Pahang South Omnibus Co. Bhd. v. Minister of Labour and Manpower* [1981] 1 CLJ 83.

> Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes, Parliament says its decision is to be final. At other times Parliament says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves make the original findings of fact. They will not themselves embark on a rehearing of the matter: see *Healey v. Minister of Health* [1955] 1 QB 221. But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly: see *In re H.K. (An Infant)* [1967] 2 QB 617, 630 and *Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 QB 417. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v. Ministry of Pensions and National Insurance* [1963] 1 WLR 186. And if the decision-making body has gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* [1965] 1 WLR 1320. (I know of some expressions to the contrary, but they are not correct.) If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1007, 1061. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding – so unreasonable that a reasonable person would not have come to it – then again the courts will interfere: see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223. If the decision-making body goes outside its powers, or misconstrues the extent of its powers, then, too, the courts can interfere: see *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v. Campbell* [1925] AC 338. In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. *If it gives no reasons – in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly: see Padifield's case.* (Italics supplied)

Having said that, Professor M.P. Jain's observations on the doctrine of Extended Ultra Vires in his well regarded work on *Administrative Law of Malaysia and Singapore* (3rd Edn) at pp. 445 and 446 should also be borne in mind. Introducing the topic the learned author says this:

> ... The courts have developed a broad doctrine of *ultra vires* so that they are able to review the exercise of wide discretionary powers to some extent on certain grounds.

Amplifying the same point, Professor Jain says this:

> A discretionary decision may *prima facie* seem to fall within the express wording of the law conferring the power, but the court may still hold it invalid because it infringes *a limitation read by the court into the power.* This judicial approach by the court denotes judicial creativity. (Emphasis supplied)

Explaining the justification for invoking the doctrine, he points out, in our view quite correctly:

> The justification for such judicial approach is that because of the expansion in the powers of the government, the potential for the abuse of power has increased and, therefore, extended judicial review in this area is a necessity ... The courts justify this approach by arguing that the legislature could not have intended that the power conferred by it be misused or abused. What the courts seek to do is to imply certain legal limits in the grant of power and to insist that certain vitiating elements (implied by them) be kept out of the decision making process.

It is also with the above principles in mind that we turn to examine the Minister's reasons for giving his decision under s. 9(5) of the Act.

To recapitulate, what we have here is the Minister's decision under s. 9(5) given, of course, in Form E as prescribed by Rule 5(b) of the relevant regulations. It is obvious that this statutory form of decision does not provide for the giving of reasons.

However, it will be recalled that subsequently, in his affidavit in opposition to the application for *certiorari*, the Minister did give reasons for his decision. The Court is, therefore, entitled to examine these reasons to determine their adequacy. As de Smith has said, in his work on *Judicial Review of Administrative Law* (5th Edn), at para 9.053:

> It is no answer to an attack on the reasons for a decision on the grounds that they disclose a failure to take into account a relevant consideration or that an irrelevant consideration was taken into account or an error of law was made, that there is no requirement to give reasons.

In the present context, it is most material to consider what the Bank had to say on the issue at hand since one would expect that it being the employer concerned should be an independent and reliable source of information. After setting out at length its rationale for promoting and/or upgrading the relevant officers to Internal Officers, the Bank itself categorically concluded as follows:

> The job responsibilities of these Internal Officers are multiskills in that, apart from the usual Internal Officer functions, including teller functions, they are also responsible for marketing and cross selling consumer loan products as well as processing instruments at the service centres.
>
> The above paragraphs clearly show the job functions, responsibilities and importance of Internal Officers' job grades and also that officers in this grade are multiskilled. They also show that such officers cannot come within the scope of NUBE representation. The above reasons ought to provide sufficient and adequate grounds justifying the Bank to reclassify the said positions as Internal Officers.

We regret to have to say that the decision-making process of the Minister was open to some justifiable criticism on three separate grounds, none of which, with respect, the learned Judge in the High Court recognised, and to which we shall now refer.

First of all, by para 10(i) of his affidavit (quoted above) the Minister had conceded that the *majority* of the relevant officers carried out the job functions listed out by the Bank but that there were *some* amongst the relevant officers who did not perform the duties of revising reports, statements and loan statistics and checking of documents for purposes of loan applications. This finding would necessarily imply that only a *minority* of the relevant officers did not perform those designated duties, yet *all* the relevant officers were treated on the same footing. Such an approach is open to the objection that the *majority* of the relevant officers – who *were* performing those duties – had not been treated fairly overall. This is a flaw which relates to the decision-making process.

The Wednesbury unreasonableness ground has been prayed in aid to support a wide meaning for unreasonableness equivalent to fairness in a broad sense. (See, *Fowler & Roderique Ltd. v. Attorney-General* [1987] 2 NZLR 56 (CA) where two courses were open and it was held that choice reached unfairly was unreasonable). Other cases on this point which may be read with profit are: *R. v. Take-overs and Mergers Panel, ex p. Guinness plc* [1990] 1 QB 146 CA; *Evans v. Collins* [1965] 1 QB 580 (DC).

On a further ground also the Minister's decision is open to challenge.

We have already pointed out that the material upon which the Minister relied for his decision under s. 9(5) consisted of the results of investigations carried out by the Director General's Department. Therefore, it is important to examine the material upon which the Director General relied in attempting to resolve the dispute between ABOM and NUBE, in discharge of his duties under s. 9(4A).

It is true that the Director General did interview representatives of NUBE, the Bank and ABOM and he did collect evidence which included certain duty lists.

But, it will be recalled – and this is significant – that the Director General in carrying out his functions under s. 9(4A), did *not* have the advantage of the participation and expertise of the Director General of Trade Unions, as he was entitled to by virtue of s. 9(4B)(b).

We recognise, that under s. 9(4B)(b), the Director General has a *discretion* whether or not to seek the assistance of the Director General of Trade Unions. But, having regard to the rival claims by ABOM and NUBE to represent the relevant officers, and with the Bank strongly supporting ABOM, the Director General should, at the very least, have gone on affidavit to state *why* he did not pray in aid the views and experience of the Director General of Trade Unions. Had he done so, then we would have known that he had exercised his *discretion* and on what grounds. We therefore do not consider that he can be taken to have exercised his discretion on the point. Indeed, as we have pointed out, there was no affidavit at all by the Director General.

In our view, in the particular circumstances of the present case, the participation and expertise of the Director General of Trade Unions under s. 9(4B)(b) of the Act, would have been of great utility in assisting the Director General to carry out his job functions under s. 9(4A) of the Act, with a view to resolving the dispute.

If the Director General had availed himself of the participation and expertise of the Director General of Trade Unions for purposes of resolving the dispute, as we consider he undoubtedly should have, it is perfectly possible that the latter *might* have given a decision under s. 9(4B)(b) in favour of ABOM, in which event, the Minister's decision under s. 9(5) *might* have been different.

In *East Hampshire District Council v. Secretary of State for the Environment and Josephi* [1979] JPL 533, 533-4, Lord Denning M.R. is reported to have said:

> So there had seemed to be a material omission and error which the inspector had made because he had not put the evidence of the principal planning officer in his report. It might well ... have influenced the Minister's decision ...

If the minister had been misled by the inspector's report owing to a mistake in it, it seemed to him (Lord Denning) only right that the decision should be quashed.

There are clear references in *Tameside* (per Lords Diplock, Salmon and Russell *ibid* at pp. 1065, 1071, 1076) requiring authorities to be adequately informed as to the facts before arriving at a decision.

Lord Diplock having asked: Did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer the question correctly, concluded that the Minister had been inadequately informed. Both Lords Salmon and Russell based their decisions on inadequacy of briefing on the issues.

And, in *New Zealand Fishing Industry Association Inc. v. Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA), 552 per Cooke P. adequacy of factual briefings was relied upon as a separate ground for review.

In our view, the omission of the Director General to exercise his powers under s. 9(4B)(b) of the Act by referring to the Director General of Trade Unions for the latter's decision on the issue at hand, resulted in the Minister not being adequately informed or briefed on that issue.

There is authority for saying that where adequate information has not been obtained to found the conclusion, that may be analysed in terms of unreasonableness. (See, *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* [1986] 162 CLR 24).

Looking back on this part of the case, we are in no position to speculate as to how the Minister would have decided if he had had the advantage of the participation and expertise of the Director General of Trade Unions. It is sufficient for ABOM to show that the decision of the Minister *might* have been different had he had that advantage. In *Simplex G.E. (Holdings) Ltd. v. Secretary of State for the Environment and the City of St. Albans District Council* [1988] COD 160, at 161, Purchas LJ said:

> It is not necessary for [the appellant] to show that the Minister would, or even probably would, have come to a different conclusion. He had to exclude only the contrary contention, namely that the Minister necessarily would still have made the same decision.

Yet another criticism of the decision-making process of the Minister is that while the Minister's affidavit *does* give reasons which focus on the nature of the job functions of the relevant officers, they do *not* extend into the area of ABOM'S legal objections to which we have adverted and, so, the question arises whether those reasons are adequate having regard to the context of the relevant legislation and the particular circumstances?

de Smith in his celebrated work on *Judicial Review of Administrative Action,* (5th Edn, at p. 559) has pointed out that "when reasons are provided even though strictly not required those reasons must be both adequate and intelligible" and deal with the substantial points which have been made.

In re Poyser and Mills Arbitration [1964] 2 QB 467 Megaw J said (at p. 478) that the required reasons "must be read as meaning that proper, adequate reasons must be given ... which deal with the substantial points that have been raised." He added that there must be something "substantially wrong or inadequate" in the reasons given. This case is also authority for treating material omissions as error of law.

In *Edwin H. Bradley and Sons Ltd. v. Secretary of State for the Environment* [1982] 264, 926, 931, Glidwell J added a rider to the words of Megaw J by saying that the reasons can be briefly stated.

In *Westminister Council v. Great Portland Estates Plc* [1985] 1 AC 661 (at p. 673) Lord Scarman speaking in the House of Lords, accepted the guidance given by Megaw J and Glidwell J 1 WLR 153.

de Smith further says (at pp. 559, 560), citing *Save Britain's Heritage v. Number 1 Poultry Ltd.* [1991] 1 WLR 153 – and we agree – "The reasons will not be construed in the same way that the courts construe statutes, but a decision may be struck down where an applicant can show substantial prejudice resulting from a failure on the part of a decision-maker to demonstrate how an issue of law had been resolved or a disputed issue of fact decided, or by "demonstrating some other lack of reasoning which raised substantial doubts over the decision-making process".

de Smith is also careful to add in a footnote, referring to the same case, that Lord Bridge emphasized (at p. 168) the adequacy of reasons depended upon the legislative context and could not be answered *in vacuo.*

Supperstone QC and Goudie QC in their book on *Judicial Review* (2nd Edn.) at para 5.44 para (e) point out that:

> In practice it is common that reasoned decisions are given, and the reasons given may then be subjected to scrutiny which on occasions nears that given to a statute. (Eg *H Lavender & Son Ltd. v. Minister of Housing and Local Government* [1970] 3 All ER 871, [1970] 1 WLR 1231 and *South Oxfordshire District Council v. Secretary of State for the Environment* [1981] 1 All ER 954, [1981] 1 WLR 1092, both planning cases which turned on the interpretation of a phrase in a decision letter.) How far it is appropriate to dissect statements of reasons must depend at least in part on how far the body giving the reasons is able to call on professional advisers to draft them.

There can be no doubt that in the present case, the Minister had had the advantage of the services of legal officers in the Attorney General's Department to draft his affidavit. His reasons will thus have to be subjected to careful scrutiny.

With respect, in our view, the reasons given by the Minister for his decision under s. 9(5), as they appear in his affidavit aforesaid, are not adequate for, apart from a bare denial (see, para 12 of his affidavit quoted above), there is no suggestion in them that he had directed his mind to the substantial points of Law which had been raised by ABOM or formed any reasoned view about them. We need hardly add that we are in no position to speculate as to how the Minister would have dealt with these points of Law had he directed his mind adequately to them.

For the sake of completeness, we would add that Miss Alice Loke Yee Ching, Senior Federal Counsel for the Minister and Mr. K.P. Gengatharan, Counsel for NUBE had no real answer to the three separate criticisms in the decision-making process of the Minister since their submissions failed to take into account or give proper weight to the various matters to which we have directed attention.

Conclusion

At the end of the day, we must keep in the forefront of our minds what Lord Donaldson M.R. said in *R. v. Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146 (CA) 160:

> ... the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the Court and, if so, what form that intervention should take.

In all the circumstances, having regard to the three separate defects in the decision-making process of the Minister to which we have referred, we are satisfied this is a case where there are substantial grounds for us to intervene. The next question is: what would be the appropriate remedies?

The judgment of the Court of Appeal quashing the decision of the Minister will therefore stand, though for wholly different reasons.

However, we are not at liberty to determine the merits of the dispute between ABOM and NUBE and so cannot decide the matter in place of the Minister who is the appropriate authority to do so by virtue of s. 9(5) of the Act.

Consequently, *mandamus* must go – an order which, incidentally, was also prayed for in the application before the High Court – directing the Minister to consider the dispute afresh according to Law, in the manner we have

indicated, that is to say, adequate regard being had to all relevant matters both of Fact and Law to which we have referred when considering the decision-making process under s. 9(5).

Having regard to the particular circumstances of this case, especially the fact that the Bank is supporting ABOM, we would direct the Director General to forthwith exercise his powers under s. 9(4B)(b) of the Act by referring to the Director General of Trade Unions for the latter's decision on the question of the rival claims as to competence of ABOM and NUBE to represent the relevant officers.

The Director General of Trade Unions will then, without delay, embark upon his enquiries and, at the conclusion thereof, give his decision under s. 9(4B)(b) preferably, with his reasons for the same.

Upon receipt of the decision of the Director General of Trade Unions under s. 9(4B)(b) accompanied by his reasons for the same (if any), the Director General will forthwith forward the same to the Minister who will then have the advantage of the participation and expertise of the Director General of Trade Unions in arriving at his decision under s. 9(5) afresh.

One final point must be made. There has never been the slightest suggestion that the Minister had acted otherwise than in good faith. Indeed, we find that he did act in good faith at all material times.

The Result

Accordingly, the appeals are dismissed, the decision of the Court of Appeal quashing the decision of the Minister is affirmed but, as we have said, for wholly different reasons, *mandamus* will go to the Minister in terms we have indicated. Costs here and in the Courts below to ABOM. Deposits to ABOM to account of taxed costs.